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## Juvenile Death Sentence Lives on... Even after *Roper v. Simmons*

AKIN ADEPOJU\*

**A crime prevention policy which accepts keeping a prisoner for life even if he is no longer a danger to society would be compatible neither with modern principles on the treatment of prisoners during the execution of their sentence nor with the idea of the reintegration of offenders into society.<sup>1</sup>**

**E**very year, children as young as thirteen years old are sentenced to die in prison in the United States. This sentencing practice continues even after the U.S. Supreme Court's decision in *Roper v. Simmons*, which held that the Eighth and Fourteenth Amendments forbid the death penalty for juvenile offenders.<sup>2</sup> This sentencing practice and national trend is called juvenile life without parole [hereinafter "LWOP"]. The elements which support the holding in *Roper v. Simmons* are that juveniles have unformed characters, are

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<sup>1</sup> Marc Mauer, Ryan S. King, and Malcolm C. Young, *The Meaning of 'Life': Long Prison Sentences in Context*, (The Sentencing Project, 2004), p. 1, [www.sentencingproject.org/pdfs/lifers.pdf](http://www.sentencingproject.org/pdfs/lifers.pdf) (last visited March 29, 2007).

<sup>2</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (5-4 decision) (banning death sentences for crimes committed by juveniles under the age of eighteen).

immature, and are more susceptible to peer pressure than adults.<sup>3</sup> This decision leads to the following question: If juveniles are categorically less culpable than adults, is it appropriate to sentence juveniles to life without parole? A 2005 report by Amnesty International and Human Rights Watch states that only four countries impose life without parole on juveniles: United States (2,225,350 of these inmates were 15 or younger when they committed the crime), Israel (7); South Africa (4); and Tanzania (1).<sup>4</sup>

This article begins with a discussion of the Supreme Court's decision to abolish the death penalty as applied to individuals convicted of crimes they committed before they turned 18 and proceeds with a detailed exposition of worldwide standards of juvenile sentencing. Part I of this note briefly discusses the history and purposes of the juvenile justice system in the United States. Further, there is a general discussion on the constitutionality of life without parole sentences, which provides an overview of the inconsistencies between Federal and State Courts' approaches when sentencing juveniles to life without parole.

Part II analyzes the international law on the rights of juveniles by using several landmark documents and treaties, such as the Convention on the Rights of Children. This leads to a survey of juvenile justice systems around the world, including case law and reform instituted as a result of the international conventions explicitly banning juvenile LWOP sentences. This discussion recognizes the importance of the world's view on the issue of juvenile LWOP and how such human rights principles should serve as persuasive authority

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<sup>3</sup> *Id.* at 570.

<sup>4</sup> Alison Parker, *The Rest of Their Lives: Life without Parole for Child Offenders in the United States* (Oct. 2005) [hereinafter "HRW Report"], 100-01.

<http://web.amnesty.org/library/index/ENGAMR511622005>, (last visited Dec 24, 2006) (This report is the first national analysis of juvenile LWOP sentences. The 2,225 people serving LWOP sentences for crimes they committed as juveniles do not include juvenile LWOP sentences in Idaho, Kentucky, Maine or West Virginia—these data were not included in the survey. See HRW Report, Appendix D: State Population Data Table at 123-24).

to America. Part II concludes by using a step-by-step approach to analyze and explain how juvenile LWOP sentences in America violate customary international law.

Part III asserts and explains why juvenile LWOP sentences violate the Eighth Amendment's prohibition of cruel and unusual punishment. This section includes a detailed analysis of the Supreme Court's decision in *Roper* and addresses the Court's recognition of international standards on human rights issues.

Part IV reviews the policy behind punishment, society's interest in punishment, and how that relates to juveniles. The analysis of the *Roper* decision and some common sense ideas lead to the conclusion that juvenile LWOP sentences are excessive and ineffective deterrent for juveniles. Further, this note takes a detailed approach examining and concluding that such sentences violate the principle of rehabilitation, impose excessive retribution, and violate constitutional principles prohibiting excessive punishment.

Part V advocates the position that reform is necessary to the juvenile justice system insofar as juvenile LWOP sentences must be abolished. It proposes ideas as to how this reform may come about—mostly through the judicial and legislative branch. Simply leaving the reform up to the state or national legislature is not acceptable because state and federal judges are authorized and compelled to act in a manner consistent with human rights standard.

The article concludes by recognizing that the Supreme Court must eventually resolve the inconsistency among the state courts and this resolution must take into consideration the unique nature of the global concurrence on the matter as the Court did in *Roper*. The Court is likely to hold that juvenile LWOP is unconstitutional because it is cruel and unusual punishment and it violates treaty obligations and/or customary international law.

## INTRODUCTION

Society has long maintained age distinctions for activities such as: purchasing guns, smoking<sup>5</sup>, purchasing or consuming alcohol, serving on juries<sup>6</sup>, consenting to sex, signing contracts<sup>7</sup>, working,<sup>8</sup> watching certain movies at the cinema,<sup>9</sup> marrying,<sup>10</sup> driving, renting cars or apartments, voting, and making healthcare decisions.<sup>11</sup> The rationale for maintaining age distinctions for certain activities is that children are presumed not to have the capacity to handle “adult” responsibilities. This rationale has been reinforced by

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<sup>5</sup> See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 587 (2001) (concluding that children “lack the judgment to make an intelligent decision about whether to smoke” *Id.*).

<sup>6</sup> See *Roper*, 543 U.S. at 569 (recognizing that most states prohibit children under 18 from voting, serving on juries, or marrying without parental consent).

<sup>7</sup> *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 95 (1976) (Stevens, J., concurring in part, dissenting in part) (recognizing that “a minor may not make an enforceable bargain.” *Id.*).

<sup>8</sup> *Id.* (recognizing that minors “may not lawfully work...” *Id.*).

<sup>9</sup> *Id.* (recognizing that minors “may not lawfully...attend exhibitions of constitutionally protected adult motion pictures.” *Id.*). See also *Markell v. Markell*, No. 805 OF 1993, 2000 WL 34201486, at 5, 7 (Pa. Ct. Com. Pl. June 28, 2000) (finding that father had let his minor children watch *Fight Club*, *There’s Something About Mary*, and *Blade*, and held that these were movies “[t]he children are too young to see”); The Classification and Rating Admin., Reasons for Movie Ratings, available at <http://www.filmratings.com/> (last visited Aug. 20, 2007) (stating in its Question & Answers section that “[c]hildren under 17 are not allowed to attend R-rated motion pictures unaccompanied by a parent or adult guardian.” *Id.*)

<sup>10</sup> *Danforth*, 428 U.S. at 95 (Recognizing that persons “below a certain age may not marry without parental consent.” *Id.*).

<sup>11</sup> See *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) (explaining that “parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions...Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment.” *Id.*); See also *Troxel v. Granville*, 530 U.S. 57, 68 (2000).

many decisions.<sup>12</sup> Recently, the United States Supreme Court has ruled that juveniles who commit serious crimes are less blameworthy than adults.<sup>13</sup> Legislatures and courts must extend this logic to juveniles sentenced to life without parole. In *Roper*, the Court concluded that juveniles were different, at least for purposes of the ultimate punishment of the death penalty, because juveniles are immature, irresponsible, more susceptible to negative influences, including peer pressure.<sup>14</sup> “Even a heinous crime committed by a juvenile is [not] evidence of irretrievably depraved character.”<sup>15</sup>

## I. JUVENILE JUSTICE SYSTEM IN THE UNITED STATES

The United States played a leadership role in establishing a separate system of criminal justice for juveniles. In 1899, Illinois became the first government in the United States to establish a juvenile court, a court that was structured differently from the “regular” criminal court.<sup>16</sup> The main goal of the juvenile court is to secure guidance and to ensure the child’s best interest.<sup>17</sup> The Supreme Court has noted that the biggest distinction between the juvenile and adult criminal

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<sup>12</sup> *Belotti v. Baird*, 443 U.S. 622, 634 (1979) (plurality opinion) (holding that judges may authorize abortions for minors since constitutional rights of children and adults are unequal due to the “peculiar vulnerability of children,” and “their inability to make critical decisions in an informed, mature manner . . .” *Id.*).

<sup>13</sup> *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (recognizing the “diminished culpability of juveniles”). *See also* *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (stating that “[t]he reasons while juveniles are not trusted with the privileges and responsibilities of an adult also explains why their irresponsible conducts is not as morally reprehensible as that of an adult.” *Id.*) “[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.” *Id.*

<sup>14</sup> *Roper*, 543 U.S. at 570.

<sup>15</sup> *Id.* (emphasis added).

<sup>16</sup> *See In re Gault*, 387 U.S. 1, 14 (1967) (tracing the history and theory underlying the development of the juvenile court system in an effort to clarify the Court’s logic in reaching its ruling).

<sup>17</sup> Rabindranath Tagore, *The Juvenile Justice System in the United States and the United Nations Convention on the Rights of the Child*, 12 B.C. THIRD WORLD L.J. 469, 476 (1992).

justice systems is rehabilitation, which is based on the understanding that children are less culpable and more amenable to rehabilitation than adults who commit similar crimes.<sup>18</sup> Indeed, juvenile offenders received minimal procedural protections in juvenile court because they were promised that the court would act in the “best interest of the child.”<sup>19</sup> This original notion of juvenile justice has been largely abandoned by the courts. In considering these deeply rooted principles of rehabilitation and acting in the child’s best interest, it is clear that the United States has fallen out of step with the rest of the world when it comes to the treatment of juvenile offenders.<sup>20</sup>

Today, juvenile sentences are often as stiff as those reserved for adult offenders. This “get tough on juvenile crime” approach is the product of a public misperception of youth crime—a view shaped by the tremendous amount of media coverage coupled with the pandering of politicians.<sup>21</sup>

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<sup>18</sup> See *McKeiver v. Pennsylvania*, 403 U.S. 528, 546 (1971); see also *Gault*, 387 U.S. at 15-16.

<sup>19</sup> *Schall v. Martin*, 467 U.S. 253, 265-66 (1984); see also *Gault*, 387 U.S. at 1.

<sup>20</sup> See Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1; Adam Liptak, *Years of Regret Follow a Hasty Guilty Plea Made*, N.Y. TIMES, Oct. 3, 2005, at A16.

<sup>21</sup> See, e.g., Robert B. Acton, Note, *Youth, Family And The Law: Defining Rights And Establishing Recognition: Gubernatorial Initiatives and Rhetoric of Juvenile Justice Reform*, 5 J.L. & POL’Y 277 (1996) (examines governors’ “initiatives and rhetoric” and finds that governors who speak out on juvenile justice issues overwhelmingly favor measures designed to send a “get tough” message); Helen Leiner, *Juvenile Justice: Act Now!*, 22 CHAMPION 11, (Jun. 1998); Lisa Popyk, *Luke’s Tormented World: The Kid Next Door Turned Killer*, CINCINNATI POST, Nov. 9, 1998, at A1; Steve Fainaru, *Alaska School Murders: A Window on Teen Rage*, BOSTON GLOBE, Oct. 18, 1998, at A1; Lisa Popyk, *Violence is Seductive to New Breed of Killers*, CINCINNATI POST, Nov. 9, 1998, at A1, available at <http://www.cincypost.com/news/2kill110998.html> (last visited August 20, 2007); Lisa Popyk, *Blood in the School Yard - Part 1 of 4-Part Series: A Young Boy Explodes and Turns a Classroom into a Killing Ground*, CINCINNATI POST, Nov. 7, 1998, at A1, <http://www.cincypost.com/news/1998/1kill110798.html> (last visited Aug. 20, 2007).

In spite of news headlines detailing heinous crimes committed by juveniles, including a series of school-shootings,<sup>22</sup> there has been a decline in youth violent crime.<sup>23</sup> However, public perceptions of youth violence have contributed to widespread support of harsher sentences and the creation of tougher crime legislation.<sup>24</sup> Examples of harsh legislation are the enactment of mandatory minimum

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<sup>22</sup> See J.R. Moehringer, *Boys Sentenced for Arkansas School Murders*, L.A. TIMES, Aug. 12, 1998, at A1; Popyk, *Blood in the School Yard*, *supra* note 21, at A1; See also Schall, 467 U.S. 253; Gault, 387 U.S. 1; See also Tom Kenworthy, *Up to 25 Die in Colorado School Shooting; Two Student Gunmen are Found Dead*, WASH. POST, Apr. 21, 1999, at A1 (in April 1999, two students killed twelve students, one teacher, and themselves in their Littleton, Colorado high school—more than 20 others were seriously wounded.); Sam Howe Verhovek, *Terror in Littleton: The Overview, Bodies Are Removed From School in Colorado*, N.Y. TIMES, Apr. 22, 1999, at A1.

<sup>23</sup> See Howard N. Snyder & Melissa Sickmund, U.S. DEP'T OF JUSTICE, *Juvenile Offenders and Victims: 2006 National Report*, at 65 (2006), available at <http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf> (presenting juvenile arrests trends) (last visited July 30, 2007) (stating “[b]etween 1994 and 2002, the number of murders involving a juvenile offender fell 65%, to its lowest in 1964.” Further, “[c]iting FBI and other data sources, the Report demonstrates that the rate of juvenile violent crime arrests has consistently decreased since 1994, falling to a level not seen since at least the 1970s.” See *id.* at iii (Foreword)).

<sup>24</sup> See, e.g., Robert O. Dawson, *The Third Justice System: The New Juvenile-Criminal System of Determinate Sentencing for the Youthful Violent Offender in Texas*, 19 ST. MARY'S L.J. 943, 949, 953 (1988); Barry C. Feld, *Violent Youth and Public Policy: A Case of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 966 (1995); Shari Del Carlo, Comment, *Oregon Voters Get Tough on Juvenile Crime: One Strike and You Are Out!*, 75 OR. L. REV. 1223, 1231 (1996); Robert Heglin, Note, *A Flurry of Recidivist Legislation Means: “Three Strikes and You’re Out,”* 20 J. LEGIS. 213, 213 (1994); Deborah L. Mills, Note, *United States v. Johnson: Acknowledging the Shift in the Juvenile Court System From Rehabilitation to Punishment*, 45 DEPAUL L. REV. 903, 932 (1996); See generally Richard Lacayo, *Lock 'Em Up! . . . ; With Outraged Americans Saying that Crime is Their No. 1 Concern, Politicians are Again Talking Tough. But are They Talking Sense*, TIME, Feb. 7, 1994, at 50, available at <http://www.time.com/time/magazine/article/0,9171,980077,00.html> (last visited Mar. 25, 2007).



sentences and the use of sentencing guidelines.<sup>25</sup> Consequently, juveniles are sentenced to LWOP because some states are inconsiderate of the offender's age.<sup>26</sup>

In *Thompson v Oklahoma*, the United States Supreme Court held that a juvenile may be sentenced to death if at the time of the commission of the offense the juvenile was at least 16 years old.<sup>27</sup> This view was reaffirmed in *Stanford v. Kentucky*<sup>28</sup> before it was overruled in 2005 by the *Roper* decision.<sup>29</sup> However, on the subject of juveniles sentenced to LWOP, 42 states currently have laws that allow youth offenders to receive such lengthy sentences.<sup>30</sup> In

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<sup>25</sup> See generally Christine M. Blegen, *Creating Options for Dealing with Juvenile Offenders* (Juvenile Crime Bill), 52 J. MO. B. 46 (1996); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993); Norval Morris, *Preface to Symposium on a Decade of Sentencing Guidelines: Revisiting the Role of the Legislature*, 28 WAKE FOREST L. REV. 181 (1993).

<sup>26</sup> See HRW Report, *supra* note 4 at 123 (Appendix D, State Population Data Table. In twenty-seven of the forty-two states that permit sentencing of juveniles to life without parole, the sentence is mandatory for anyone, regardless of age, found guilty of certain enumerated crimes). See *infra* note 30 for number of states with no age limit on the imposition of LWOP.

<sup>27</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988).

<sup>28</sup> *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

<sup>29</sup> *Roper v. Simmons*, 543 U.S. 551, 574-75 (2005).

<sup>30</sup> At least fourteen states can impose LWOP to a person of *any* age: Rhode Island, Delaware, Florida, Hawaii, Idaho, Maryland, Nevada, New Hampshire, North Carolina, South Carolina, Pennsylvania, Tennessee, West Virginia, and Maine. See, e.g., R.I. GEN. LAWS § 14-1-7 (2002), R.I. GEN. LAWS § 12-19.2-4 (2002) (LWOP sentence is discretionary); DEL. CODE ANN. tit. 10, § 1010 (1999 & Supp. 2004); DEL. CODE ANN. tit. 10, § 1011 (1999 & Supp. 2004); FLA. STAT. § 985.56 (amended 2007), FLA. STAT. § 985.557 (2007); FLA. STAT. § 985.56 (3) (2007) ("if the child is found to have committed the offense punishable by death or life imprisonment, the child shall be sentenced as an adult"); HAW. REV. STAT. ANN. § 571-22 (LexisNexis 2005 & Supp. 2005); HAW. REV. STAT. ANN. § 706-656 (LexisNexis 2003 & Supp. 2005) (mandatory LWOP for specified felonies); IDAHO CODE ANN. § 18-4004 (2004); ME. REV. STAT. ANN. tit. 15, § 3101 (4)(e) (2003 and West Supp. 2005), ME. REV. STAT. ANN. tit. 17-A, § 1251 (West Supp. 2005) (permitting life sentences), see *State v. St. Pierre*, 584 A.2d 618, 621 (Me. 1990) (the time for LWOP

Washington, an eight-year-old offender may receive a life sentence.<sup>31</sup> Eight states, including the District of Columbia, have barred juvenile LWOP sentences.<sup>32</sup>

### A. Constitutionality of Life Sentences

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sentences are discretionary under § 1251); MD. CODE ANN., CRIM. LAW § 2-202(b)(2) (West 2005 & Supp. 2005) (discretionary LWOP for defendants under 18); NEV. REV. STAT. ANN. § 200.030 (LexisNexis 2001 & Supp. 2003) (discretionary LWOP sentence for murder); N.H. REV. STAT. ANN. § 630-1-a (LexisNexis 2006) (mandatory LWOP sentence a person convicted of first degree murder); N.C. GEN. STAT. § 14-17 (2005) (mandatory LWOP sentence for anyone 17 or under convicted of first-degree murder); 18 PA. CONS. STAT. ANN. § 1102 (West 1998 & Supp. 2005) (mandatory life imprisonment for murder); 61 PA. CONS. STAT. ANN. § 331.21 (West 1999 & Supp. 2005) (life imprisonment translates to LWOP); S.C. CODE ANN. § 20-7-7605 (6) (1985 & Supp. 2005), *see also* *State v. Corey*, 529 S.E.2d 20, 23 (S.C. 2000) (interpreting the silence of age limit in § 7605 (6) as requiring no age limit); TENN. CODE ANN. § 39-13-202 (c)(2) (2003 & Supp. 2005); W. VA. CODE § 61-2-2 (2005) (mandatory LWOP for first degree murder).

<sup>31</sup> *See* *State v. Furman*, 858 P.2d 1092, 1102 (Wash. 1993); *See also* *Commonwealth v. Kocher*, 602 A.2d 1308 (Pa. 1992) (a similar Pennsylvania case where a nine-year-old fourth-grader was sentenced to LWOP. In reversing the sentence, Justice Flaherty stated that public policy prohibits the prosecution of a nine-year-old for murder and that it was “attempted in this instance shocks [his] conscience.” *Id.* at 1315 (Flaherty, J., concurring)).

<sup>32</sup> Jurisdictions barring juvenile LWOP sentences include Washington DC, Kansas, Nebraska, New York, Oregon, Texas, Arkansas, and New Mexico. *See, e.g.*, D.C. CODE § 22-2104(a); KAN. STAT. ANN. § 21-4622 (2000 & SUPP. 2005); NEB. REV. STAT. § 29-2204(3) (West 2003) (prohibiting LWOP for anyone under 18, maximum sentence is life with parole only if mandatory, other life with parole is discretionary); N.Y. PENAL LAW §§ 70.00(5), N.Y. PENAL LAW §§ 125.27(1)(b); OR. REV. STAT. § 161.620 (2005), *State v. Davilla*, 972 P.2d 902, 904 (Or. Ct. App. 1998) (interpreting § 161.620 to bar juvenile LWOP); TEX. FAM. CODE ANN. § 54.04 (d)(3)(A) (Vernon 2006); ALASKA STAT. § 12.15.125(a), (h), & (j) (LexisNexis 2004); N.M. STAT. ANN. § 31-21-10 (Supp. 2005). *See also* CAL PENAL CODE § 190.5B (prohibiting LWOP sentences for juveniles under age 16); IND. CODE § 35-50-2-3 (b)(2) (prohibiting LWOP sentences for juveniles under age 16).

Beginning in the early 1980s, the Supreme Court decided a few cases regarding the constitutionality of life sentences.<sup>33</sup> In *Solem v. Helm*, the Court found a LWOP sentence disproportionate and articulated a three-part test that must be considered when analyzing proportionality of sentencing to the crime.<sup>34</sup> First, the Court will consider the gravity of the offense and the harshness of the penalty.<sup>35</sup> Second, sentences imposed on other criminals (for more or less serious offenses) in the same jurisdiction should be considered. Finally, the Court considers whether the sentences imposed are similar to those in other jurisdictions.<sup>36</sup>

Using the three-part test, the Supreme Court, in *Penry v. Lynaugh*, held that life imprisonment for murder in the first degree, even where the convicted person is barely into his teens, is neither cruel nor unusual.<sup>37</sup> Most federal courts have adopted a dim view on sentencing when balancing the *Solem* factors and have focused largely on the gravity of the offense without giving due weight to the juvenile's culpability and other individual mitigating circumstances.<sup>38</sup>

## B. Federal Court's Approach to Juvenile LWOP

Challenges to juvenile LWOP sentences have been largely unsuccessful in state and federal courts. The imposition of life imprisonment without parole on a juvenile

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<sup>33</sup> *Rummell v. Estelle*, 445 U.S. 263, 265 (1980) (There, petitioner unsuccessfully argued that "life imprisonment was 'grossly disproportionate' to the three felonies that formed the predicate for his sentence and that therefore the sentence violated the ban on cruel and unusual punishments of the Eighth and Fourteenth Amendments.").

<sup>34</sup> *Solem v. Helm*, 463 U.S. 277, 291-92 (1983).

<sup>35</sup> *Id.* at 278.

<sup>36</sup> *Id.*

<sup>37</sup> *Penry v. Lynaugh*, 492 U.S. 302 (1989).

<sup>38</sup> *See, e.g., United States v. Simpson*, 8 F.3d 546, 550 (7th Cir. 1993) (holding that "a particular offense that falls within legislatively prescribed limits will not be considered disproportionate unless the sentencing judge abused his discretion" (quoting *United States v. Vasquez*, 966 F.2d 254, 261 (7th Cir. 1992)).

was challenged in *Harris v Wright*.<sup>39</sup> There, the Court held that “youth has no obvious bearing on this problem...life imprisonment without parole is, for young and old alike, only an outlying point on the continuum of prison sentences.”<sup>40</sup> The Court reasoned that these sentences are consistent with evolving standards of decency and not rejected by U.S culture and laws. This was consistent with the majority judgment in *Harmelin v. Michigan*, which held that for non-death penalty cases a proportionality test did not require individualization.<sup>41</sup> Following this line of reasoning, the Court of Appeals for the Seventh Circuit, in *Rice v. Cooper*, upheld the constitutionality of a juvenile LWOP sentence because the sentencing judge determined the sentence to be proportionate to the crime, even though the court recognized that the sentence was exceptionally severe for a juvenile.<sup>42</sup> These cases and their progeny, show that federal courts give serious weight to the nature of the offense and not to the age of the offender.

### C. State Courts’ Approach to Juvenile LWOP

State courts have been ambivalent in considering individual factors affecting a juvenile’s culpability. Some state courts have taken a progressive view by considering the age of the offender, whereas some have not. In *Workmen v. Commonwealth*, the Kentucky Supreme Court upheld a Kentucky law mandating life without parole for adults

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<sup>39</sup> *Harris v. Wright*, 93 F.3d 581 (9th Cir. 1996).

<sup>40</sup> *Id.* at 585. *See also* *Rodriquez v. Peters*, 63 F.3d 546, 568 (7th Cir. 1995) (refusing to consider age of 15-year-old offender).

<sup>41</sup> *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (individualization is where a court gives each juvenile’s case unique consideration). Under this approach, the court gives attention to both legal factors (e.g., nature of the offense, prior adjudications) and extra-legal factors (e.g., remorse, terrible upbringing, motivation to accept intervention, capability for reform).

<sup>42</sup> *Rice v. Cooper*, 148 F.3d 747, 752 (7th Cir. 1998). *See also* *State v. Green*, 502 S.E.2d 819, 832 (N.C. 1998) (reasoning that that the crime committed was “not the type attributable to...a child”, the juvenile deserved no “special consideration.” *Id.* at 832.).

convicted of rape, but found “a different situation prevails when punishment of this stringent nature is applied to a juvenile.”<sup>43</sup> The court held that *life imprisonment without parole for two 14 year olds “shocks the general conscience of society today and is intolerable to fundamental fairness.”*<sup>44</sup> The Indiana Supreme Court shared similar views when it concluded that age is a “significant mitigating circumstance” when it comes to sentencing juveniles.<sup>45</sup>

The Nevada Supreme Court adopted a similar approach in *Naovarath v. State*.<sup>46</sup> *Naovarath* involved the constitutionality of a life sentence imposed on a 13-year-old convicted of murder. Applying the Eighth Amendment’s prohibition on “cruel and unusual punishment,” the Nevada court concluded that life without parole is a cruel and unusual sentence for a child offender. The Court stated, in part:

We do not question the right of society to some retribution against a child murderer, but given the undeniably lesser culpability of children for their bad actions, their capacity for growth and society’s special obligation to children, almost anyone will be prompted to ask whether [a juvenile] *deserves* the degree of retribution represented by the hopelessness of a life sentence without possibility of parole, even for the crime of murder. We conclude that...life without possibility of parole is excessive punishment for this thirteen-year-old boy.<sup>47</sup>

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<sup>43</sup> *Workmen v. Commonwealth*, 429 S.W.2d 374, 377 (Ky. 1968).

<sup>44</sup> *Id.* at 378 (emphasis added).

<sup>45</sup> *Trowbrigde v. State*, 717 N.E.2d 138, 150 (Ind. 1999) (finding consideration of age consistent with an Indiana statute prohibiting life in prison without parole sentences for youth under sixteen. *See* IND. CODE § 35-50-2-3(b) (2004)).

<sup>46</sup> *Naovarath v. State*, 779 P.2d 944 (Nev. 1989).

<sup>47</sup> *Id.* at 948 (emphasis added).

In stark contrast, many state courts have held that juvenile LWOP sentences are constitutional.<sup>48</sup> For instance, in *State v. Pilcher*, the court held that a LWOP sentence for a 15-year-old convicted of murder was not unconstitutional under the Eighth Amendment.<sup>49</sup> Similarly, the Washington Court of Appeals affirmed a life sentence for a 13-year-old convicted of murder by rejecting the idea that the proportionality analysis should include consideration of the offender's age and finding that the analysis includes only "a balance between the crime and the sentence imposed."<sup>50</sup> Many state courts have adopted similar approaches in sentencing juveniles to life imprisonment.<sup>51</sup> *Roper* changed the legal landscape and calls into question this sentencing approach.

Like a death sentence, a sentence of life without the possibility of parole disregards the special characteristics of juveniles and their capability to reform.<sup>52</sup> In fact, life without parole sentences have been compared to a "death sentence by

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<sup>48</sup> *State v. Standard*, 569 S.E.2d 325, 329 (S.C. 2002), cert. denied, 537 U.S. 1195 (2003) (holding that "modern society apparently condones" such punishment).

<sup>49</sup> *State v. Pilcher*, 655 So.2d 636, 644 (La. Ct. App. 1995).

<sup>50</sup> *State v. Massey*, 803 P.2d 340, 348 (Wash. Ct. App. 1990), cert. denied, 499 U.S. 960 (1991).

<sup>51</sup> *See, e.g., Iowa v. Speaks*, 576 N.W.2d 629, 632 (Iowa Ct. App., 1998) (affirming a 15-year-old's LWOP sentence for first degree murder); *State v. Garcia*, 561 N.W.2d 599, 609 (N.D. 1997) (holding a LWOP sentence for a sixteen-year-old did not violate Eighth Amendment) cert. denied, 200 U.S. 118 (1997); *Swinford v. State*, 653 So.2d 912, 918 (Miss. 1995) (upholding LWOP sentence for 14-year-old); *State v. Foley*, 456 So.2d 979, 984 (La. 1984) (affirming LWOP sentence of 15-year-old convicted of rape against); *White v. State*, 374 So.2d 843, 847 (Miss. 1979) (holding a 16-year-old's LWOP sentence for armed robbery did not violate Eighth Amendment); *People v. Fernandez*, 883 P.2d 491, 495 (Colo. Ct. App., 1994).

<sup>52</sup> *See* Elizabeth Cepparulo, *Roper v. Simmons: Unveiling Juvenile Purgatory: Is Life Really Better Than Death?*, 16 TEMP. POL. & CIV. RTS. L. REV. 225 (2006) (stating that "[t]here are fervent constitutional arguments to support a Supreme Court declaration that mandatory LWOP is equivalent to the death penalty for juveniles, and should thus be deemed cruel and unusual." *Id.*)

incarceration.”<sup>53</sup> LWOP allows no more room for rehabilitation than the death penalty. When a juvenile is sentenced to LWOP, any opportunity to learn from the mistake, change, and have a chance at reintegration is completely eliminated. LWOP sentences constitute an impermissible and unconstitutional punishment for juveniles because the special characteristics juveniles inherently have for reform, as recognized in *Roper*, are not taken into consideration.

## II. INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN

In November 1959, the United Nations General Assembly adopted the Declaration on the Rights of the Child, which recognized that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”<sup>54</sup> The United States was one of the 78 members of the U.N. General Assembly, which voted unanimously to adopt the Declaration.

Further, similar to the domestic goals of juvenile justice, the International Covenant on Civil and Political Rights [hereinafter “ICCPR”], to which the United States is a party, specifically acknowledges the need for special treatment of children in the criminal justice system and emphasizes the

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<sup>53</sup> “You are trading a slow form of death for a faster one.” See Adam Liptak, *Serving Life, With No Chance of Redemption*, N.Y. TIMES, Oct. 5, 2005, at 4 (quoting Paul Wright and Randy Arroyo, whose death sentence was commuted to life without parole as a result of the *Roper* decision, agreed).

<sup>54</sup> G. A. Res. 1386 (XIV), November 20, 1959, <http://www.unhchr.ch/html/menu3/b/25.htm> (last visited March 25, 2007). See also The American Convention on Human Rights, Series no. 36, p. 1, Organization of American States, Official Record, OEA/Ser.L/V/II.23, signed by the OAS on November 22, 1969, entered into force July 18, 1978, states in Article 19: “Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.” [http://www.hrcr.org/docs/American\\_Convention/Text/oashr5.html](http://www.hrcr.org/docs/American_Convention/Text/oashr5.html) (last visited Mar. 25, 2007).

importance of their *rehabilitation*.<sup>55</sup> When the United States ratified the ICCPR, it attached a limiting reservation that states:

That the policy and practice of the United States are generally in compliance with and supportive of the Covenant's provisions regarding treatment of juveniles in the criminal justice system. Nevertheless, the United States reserves the right, *in exceptional circumstances*, to treat juveniles as adults, notwithstanding paragraphs 2 (b) and 3 of article 10 and paragraph 4 of article 14.<sup>56</sup>

Nothing in this reservation suggests that the United States sought to reserve the right to sentence children as harshly as adults who commit similar crimes.<sup>57</sup> Likewise, the United

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<sup>55</sup> United Nations International Covenant for Civil and Political Rights, Art. 10 (3), Dec. 16, 1966, 99 U.N.T.S., at 175, [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm) (last visited Mar. 25, 2007) (juvenile reformation and social rehabilitation should be an essential aim of treatment.) (emphasis added). See Human Rights Committee, General Comment no. 1, Forty-fourth Session (1992), para. 13, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.7, p. 155, [http://www.bayefsky.com/general/all\\_hri\\_gen\\_1\\_rev\\_7.pdf](http://www.bayefsky.com/general/all_hri_gen_1_rev_7.pdf) (last visited March 25, 2007) (The Human Rights Committee has interpreted the ICCPR's provisions on child offenders to apply to "*all persons* under the age of eighteen" and requires each State, when incarcerating juveniles, must focus on "reformation and social rehabilitation.").

<sup>56</sup> United Nations Treaty Collection, *Declarations & Reservations, United States of America*, at para. 5, [http://www.unhchr.ch/html/menu3/b/treaty5\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm) (last visited Mar. 25, 2007) (emphasis added). See also *id.* at para. 2 The U.S. further reserved the "*right to impose capital punishment on any person (other than a pregnant woman)*" including juveniles (emphasis added).

<sup>57</sup> See Senate Comm. on Foreign Relations, Report on the International Covenant on Civil and Political Rights (1992), *reprinted in* 31 I.L.M. 645, 651 (1992) (The reservations are silent on juvenile life without parole sentences). (The U.S. reservation dealing with specific types of sentencing is contained in reservation number two, where the



States co-sponsored Article 14(4)—an article similar to its domestic laws—that mandates punishments for children charged with crimes must consider the age of the offender and promote their rehabilitation.

### A. Convention on the Rights of the Child

The Convention on the Rights of the Child [hereinafter “CRC”] is the “most widely and rapidly ratified human rights treaty in history.”<sup>58</sup> The CRC was adopted on November 20, 1989 in New York. It is the first international human rights instrument to adopt a common ethical and legal framework for the treatment of incarcerated juveniles. Currently 191 out of 193 countries have ratified or accepted the Convention.<sup>59</sup> The United States and Somalia<sup>60</sup> are the only two countries in the world that have not ratified the CRC, although both have signed it.<sup>61</sup> As a signatory to the CRC, the United States may not take actions that would defeat the Convention’s object and purpose.

The CRC is clear, precise, and unambiguous when it comes to sentencing juveniles to life without possibility of parole. Article 37(a) of the CRC provides that: “Neither capital punishment *nor life imprisonment without the possibility of release* shall be imposed for offences committed by persons below eighteen years of age.”<sup>62</sup> Further, Article

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United States reserved the right to impose capital punishment on any person, including those persons below eighteen years of age.).

<sup>58</sup> See UNICEF, *Frequently Asked Questions*, [http://www.unicef.org/crc/index\\_30229.html](http://www.unicef.org/crc/index_30229.html) (last visited Dec. 29, 2006).

<sup>59</sup> *Id.*

<sup>60</sup> See *id.* (according to the United Nations’ agency for children, UNICEF, “Somalia is currently unable to proceed to ratification as it has no recognized government.” *Id.*).

<sup>61</sup> *Id.* (“By signing the Convention, the United States has signalled its intention to ratify—but has yet to do so.” *Id.*) The United States signed the CRC on February 16, 1995. John F. Harris, *U.S. to Sign U.N. Pact on Child Rights*, WASH. POST, Feb. 11, 1995, at A3.

<sup>62</sup> *Convention on the Rights of the Child*, Article 37(a), G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990 (emphasis added).

40 of the CRC emphasizes that the primary aim of juvenile justice is the rehabilitation and reintegration of the child into society.<sup>63</sup>

## B. Juvenile Justice Around the World

In determining the standards of decency, American courts must consider international law. Although there has been some outcry concerning whether the Supreme Court may look to international standards, the *Roper* Court firmly stated that looking at standards in other countries is common.<sup>64</sup> In *Roper*, the Court stated that “at least from the time of the Court’s decision in *Trop v. Dulles*, decided in 1958, the Court has referred to the laws of other countries and to international authorities as *instructive* for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”<sup>65</sup> The Court emphasized “the stark reality” that the United States is the only country in the world where juveniles have the possibility of receiving the death penalty.<sup>66</sup> Furthermore, the respondents in *Roper* argued Article 37 of

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<http://www.unhchr.ch/html/menu3/b/k2crc.htm> (last visited Aug. 20, 2007) [hereinafter “Article 37(a)"].

<sup>63</sup> *Convention on the Rights of the Child*, Article 40(1), <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (last visited Aug. 20, 2007) [hereinafter “Article 40(1)"].

<sup>64</sup> *Roper*, 543 U.S. at 575; *See also* *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (mentioning in a footnote that international law prohibited execution of the mentally retarded); *Enmund v. Florida*, 458 U.S. 782, 796-97 n.22 (1982) (observing that “the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of Commonwealth countries, and is unknown in Continental Europe”); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (stating, “It is...not irrelevant here that out of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.”).

<sup>65</sup> *See Roper*, 543 U.S. at 575 (emphasis added) *See also Atkins*, 536 U.S. at 317; *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (plurality opinion) (stating, “The civilized nations of the world are in virtual unanimity” with the court’s assessment that the punishment of statelessness is contrary to evolving standards of decency).

<sup>66</sup> *Roper*, 543 U.S. at 575.

the CRC bans juvenile death penalty.<sup>67</sup> This same provision of the CRC bans juvenile LWOP.<sup>68</sup>

This draconian system of punishment is unparalleled internationally. The same sentences imposed on juveniles across America are absolutely verboten in Canada,<sup>69</sup> United Kingdom,<sup>70</sup> Ireland, Austria, Sweden, and almost the entire world, including “developing” countries. Even those nations that share our Anglo-American heritage do not subject juveniles to LWOP sentences.<sup>71</sup> For example, the European Court of Human Rights, governing the countries belonging to the European Union, held in *Hussain v. United Kingdom* that a LWOP sentence of a 16-year-old convicted of murder was illegal.<sup>72</sup> The European Court held a sentence of life

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<sup>67</sup> *Id.* at 576.

<sup>68</sup> *Convention on the Rights of the Child*, *supra* note 60 ( “Neither capital punishment nor life imprisonment without the possibility of release . . .” *Id.*) (emphasis added).

<sup>69</sup> See Committee on the Rights of Child, 1994, State Party Report: Canada CRC/C/11/Add.3, para. 315-52, <http://www.unhchr.ch/tbs/doc.nsf> (click on “By County” link on left, then click on “C,” then Canada. Click the next button until find 28/07/1994 State Party Report [CRC/c/11/Add.3] click on “E” for English version.) (last visited Dec. 22, 2006) (“In the Canadian criminal justice system the most serious penalty that can be imposed on youths is a sentence of life imprisonment, with eligibility for parole within 5 to 10 years.” *Id.* at para. 351).

<sup>70</sup> See Committee on the Rights of Child, State Party Report: United Kingdom of Great Britain and Northern Ireland. 28/03/94. CRC/C/11Add.1, paras. 574, 583, <http://www.unhchr.ch/tbs/doc.nsf> (click on “By County” link on left, then click on “U,” then “United Kingdom of Great Britain and Northern Ireland” link. Click the next button until find 28/03/1994 State Party Report [CRC/c/11/Add.1] click on “E” for English version.) (last visited Dec. 26, 2006) “The emphasis will not be on punishment but on providing children with the skills they need to give up their offending behaviour through an intensive supervision to ensure their successful *reintroduction* into society.” *Id.* at para. 574 (emphasis added); “Under the Children and Young persons Act of 1933, anyone found guilty of murder under the age of 18 at the time of the offence is sentenced to detention during Her Majesty’s Pleasure, *not to life imprisonment.*” *Id.* at para. 583 (emphasis added).

<sup>71</sup> See *Roper*, 543 U.S. at 576.

<sup>72</sup> *Hussain v. United Kingdom*, 22 E.H.R.R. 1 (1996), available at <http://www.worldlii.org/eu/cases/ECHR/1996/8.html> (last visited Dec. 4, 2006).

imprisonment with no possibility of parole would constitute “a failure to have regard of the changes which inevitable occur with maturation.”<sup>73</sup> The CRC has been adopted and embraced by virtually every country except the United States. Significantly, none of the 191 countries that have ratified the treaty has registered a reservation to the CRC’s prohibition on juvenile life imprisonment without parole.<sup>74</sup> In Africa, 31 countries prohibit life without parole for children in their penal laws.<sup>75</sup> “Only three other nations – Tanzania, South Africa, and Israel – have sentenced juveniles to life without parole, and *they have a total of 12 such prisoners combined.*”<sup>76</sup>

### C. International Human Rights Principles as Persuasive Authority

The imposition of LWOP sentences on juveniles is offensive to the stated goal of rehabilitation. These sentences *clearly* violate international law—more specifically, Article

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<sup>73</sup> *Id.* at 53.

<sup>74</sup> See Howard Davidson, *The Convention on the Rights of the Child: A Call for US Participation*, <http://www.abanet.org/irr/hr/winter05/intro.html> (last visited Aug. 25, 2007) (stating that the CRC “was drafted with the active involvement of representatives of the Reagan administration,” was “approved overwhelmingly” and “the United States stands alone among the world’s nations as the only country choosing not to support the CRC.” See also HRW Report, *supra* note 4, at 99 (stating that “[n]otably, none of the state parties to the treaty has registered a reservation to the CRC’s prohibition on life imprisonment without release for children”).

<sup>75</sup> See HRW Report, *supra* note 4, at 105 (These countries are Algeria, Angola, Benin, Botswana, Burundi, Cameroon, Cape Verde, Chad, Cote d’Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Guinea, Guinea-Bissau, Lesotho, Liberia, Libya, Madagascar, Mali, Mauritius, Morocco, Mozambique, Namibia, Niger, Rwanda, Sao Tome and Principe, Togo, Tunisia, Uganda, and Zimbabwe).

<sup>76</sup> Bob Egelko, *180 teen killers locked up for life, report says, Change proposed to allow paroles*, SAN FRANCISCO CHRONICLE, Oct. 13, 2005, at B 3, available at <http://sfgate.com/cgi-in/article.cgi?file=/c/a/2005/10/13/BAG00F7GFI1.DTL>, (last visited Mar. 24, 2007) (emphasis added).

37(a) of the CRC.<sup>77</sup> The issue is whether the United States is bound by international law and standards where it is a signatory and co-sponsor to a treaty but has not yet ratified it. The answer to this question must be “yes.” Article 18 of the Vienna Convention on the Law of Treaties outlines the responsibilities a country undertakes when it signs a treaty—the most basic responsibility for signatory countries is “to refrain from acts which would defeat the object and purpose of a treaty.”<sup>78</sup> If the United States wants to be free from this obligation, the appropriate means is to “unsign,” rather than ignore the basic tenets of the treaty.<sup>79</sup> Signing a treaty explicitly prohibiting the sentencing of juveniles to life without the possibility of parole and subsequently continuing to impose such sentences commits violence to the purpose and object of such treaty. This is especially true because federal law permits mandatory juvenile LWOP sentences.<sup>80</sup>

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<sup>77</sup> *Article 37(a)*, *supra* note 62 (Article 37(a) states “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.” *Id.*).

<sup>78</sup> Vienna Convention on the Law of Treaties, art 18, 1155 U.N.T.S. 331, 8 I.L.M. 679. *See also* Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2067 n. 25 (2003) (noting that signing a treaty without ratifying it “may also invest the signatory with particular rights under the treaty” *Id.* at 2067 n.25.) (Indeed, some commentators have argued that a signatory country’s behavior that is inconsistent with the “major or indispensable provision” violates its treaty obligations. *Id.* at 2078 (citing Paul V. McDade, *The Interim Obligation Between Signature and Ratification of a Treaty*, 32 NETH. INT’L REV. 5, 42 (1985)).

<sup>79</sup> Swaine, *supra* note 78, at 2082 (recognizing that Article 18 “does not require that the interim obligation be observed for eternity, but instead only ‘until [the signatory] shall have made its intention clear not to become a party to the treaty’” “Unsigning” a treaty allows a country to revert “back to the status it might have retained all along ...”, which is what occurred on May 6, 2002, when the United States unsigned the Rome Statute. *Id.* at 2062.). Unfortunately, the United States has a history of violating treaty obligations. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 69-70 (Mar. 31); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 475-76 (June 27).

<sup>80</sup> 18 U.S.C.A. §1111 (West 2003) (requiring that *anyone* convicted of first degree murder be sentenced to death or life imprisonment). Under federal law, a life sentence carries no possibility of parole. *See* United

Apart from treaty obligations, international human rights principles are also “instructive” in determining appropriate punishments.<sup>81</sup>

Accordingly, the United States cannot ignore the prevailing standards of decency and fairness when it comes to sentencing juveniles. The current system allows reform to begin right away. Not only should state officials enact laws prohibiting life imprisonment without parole for juveniles, but the federal government has an obligation to ensure that states comply with this constitutional and international mandate. Congress should enact laws to eliminate the sentence in the future, even though the international treaty signed by the United States has a direct effect on the state and federal government without the need for new legislation.<sup>82</sup>

#### **D. Juvenile LWOP Violates Customary International Law**

The Supreme Court has not ruled on the constitutionality of juvenile LWOP sentences. However, federal and state

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States v. LaFleur, 971 F.2d 200, 209 (9th Cir. 1991) (stating that “Congress eliminated all federal parole.” *Id.* at 209.).

<sup>81</sup> See *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

<sup>82</sup> *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) (stating that “[t]he rule of equality established by [the treaty]...stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.”). Therefore, rights conferred by international law in a treaty signed by the United States have the same legal effect as laws enacted by Congress. However, a federal statute banning juvenile life without parole, serves both a symbolic and practical purpose because Congress will present a uniform view on how juveniles must be treated in the United States and such law will better enforce domestic adherence to the CRC. Congressional statute on point would be most helpful because American courts have been reluctant in enforcing human rights treaty provisions absent domestic legislation. See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 203 (1999) (concluding, after reviewing many cases, that “judges have failed to appreciate the possibilities for judicial application of human rights treaties to which the United States is a party” *Id.* at 203.).

governments' policies of imposing life without parole sentences on juveniles, violates U.S. constitutional law, which requires both individual states and the federal government to uphold human rights treaties made under the authority of the United States. The U.S. Constitution states that:

Th[e] Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States shall be the Supreme Law of the Land; and *the Judges in every State shall be bound thereby*, anything in the Constitution or Law of any State to the contrary notwithstanding.<sup>83</sup>

When interpreting this constitutional principle, the Supreme Court has stated that, “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of the appropriate jurisdiction . . . .”<sup>84</sup> Treaties of the United States have been held to be binding on states, independent of the will and power of state legislatures.<sup>85</sup> Such treaties stand on the same footing of supremacy as do the provisions of the Constitution and laws of the United States and “[o]perates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.”<sup>86</sup> Human rights

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<sup>83</sup> U.S. CONST. art. VI, § 2 (emphasis added).

<sup>84</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900). See *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Statutes “ought never to be construed to violate . . . rights . . . further than is warranted by the law of nations...”); See also Harold Honju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825 (1998) (noting that customary international law is federal law and preempts inconsistent state practices).

<sup>85</sup> See *Asakura*, 265 U.S.332 (holding that a treaty made under the authority of the United States stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States.).

<sup>86</sup> See *id.* at 341 (citing *Maiorano v. Baltimore & Ohio R. R. Co.*, 213 U.S. 268, 272 (1909)); *Head Money Cases*, 112 U.S. 580, 598 (1884);

treaties, like other treaty obligations of the U.S. government, are also binding on state governments.<sup>87</sup> Further, Article 50 of the ICCPR provides that the provisions of the Covenant “shall extend to *all* parts of federal States without any limitations or exceptions.”<sup>88</sup>

Some argue that the U.S. does not violate international vis-à-vis the CRC’s explicit ban on juvenile LWOP sentences<sup>89</sup> because it has not ratified the CRC. Even if this were true, the U.S. violates customary international law. Customary international laws are “widely held fundamental principles of civilized society that [are so basic that] they constitute binding norms on the community of nations.”<sup>90</sup> As described above, the international rejection of juvenile life without parole sentences is so overpowering that it has attained customary international law status. Unlike treaties, customary international law is not written. The Supreme Court has long established that customary international law is binding on the government of the United States because it is “part of our law, and must be ascertained and administered by the courts of justice . . . ”<sup>91</sup>

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Chew Heong v. United States, 112 U. S. 536, 540 (1884); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829)).

<sup>87</sup> Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 764 (1988). *See also Asakura*, 265 U.S. at 341 (“The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy, as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.” *Id.*).

<sup>88</sup> *See* Office of the United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, at Article 50, <http://www.ohchr.org/english/law/ccpr.htm>, (last visited Dec. 12, 2006) [hereinafter “Article 50”].

<sup>89</sup> *See* Article 37(a), *supra* note 62.

<sup>90</sup> *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 439 (D.N.J. 1999).

<sup>91</sup> *The Paquete Habana*, 175 U.S. at 700. *See also Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D.Mass.1995) (it is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES §111,



To establish that a certain rule has attained custom status, two elements must be satisfied. First, the rule must be a widespread and consistent governmental practice.<sup>92</sup> Second, the rule must be followed out of a sense of legal obligation in the international community or *opinio juris* accompanying the practice.<sup>93</sup> The practice establishing a customary rule means the rule is followed regularly or that state practice is “common, consistent and concordant.”<sup>94</sup> Given the size of the world, the practice does not have to be followed in every country or be completely uniform.<sup>95</sup> Instead, the practice must be followed in many countries rising to the level of a general consensus.<sup>96</sup>

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reporter’s note 4 (1987) (noting that international law is ‘part of our law’...and is federal law.).

<sup>92</sup> Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 INT’L & COMP. L.Q. 501 (1995) (noting that customary international law result from the uniform and consistent conduct of States); *Fisheries Jurisdiction Case (United Kingdom v. Iceland) (Merits)* [1974] ICJ Reports 3 at 50. <http://www.oceanlaw.net/cases/fishj1mer.htm> (last visited Dec. 22, 2006).

<sup>93</sup> See, e.g., KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW, 53 (2d rev. ed. 1993) (stating “[a]n international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law.” *Id.*); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES, 3 (2d ed. 2003) (stating [c]ustomary international law actually has two primary components which must generally be conjoined: (1) patterns of practice or behavior, and (2) patterns of legal expectation, ‘acceptance’ as law, or *opinio juris*.”); Elias, *supra* note 92, at 501 (“Doctrine generally holds that customary international law results from (a) the uniform and consistent conduct of States, undertaken with (b) the conscious conviction on the part of States that they are acting in conformity with law, or that they were required so to act by law.” *Id.*).

<sup>94</sup> *Fisheries Jurisdiction Case*, *supra* note 92, at 50.

<sup>95</sup> See *Xuncax*, 886 F. Supp. at 187 (D.Mass.1995) (stating that “[i]t is not necessary that [customary international law] be fully defined and universally agreed upon before a given action...is clearly proscribed under international law...” *Id.*).

<sup>96</sup> *Forti v. Suarez-Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988) (Explaining that there “need not [be] unanimity among nations. Rather, [the plaintiff must show] a general recognition among states that a specific practice is prohibited.” *Id.*).

There is customary international law against the sentencing of juveniles to LWOP.<sup>97</sup> The widespread adherence to the CRC and consistent worldwide refusal to impose the sentence on children indicate that both of these elements are satisfied. The fact that the CRC is the product of extensive discussion involving multiple States indicates that the CRC represents a consensus that virtually every country in the world, including the United States, was willing to accept. The 191 nations that have ratified the CRC have refrained from sentencing juveniles to LWOP due to their legal obligation under the treaty. Thus, the CRC is a part of the customary international law. Once a rule of customary international law is established, that rule becomes binding even on states that have not formally agreed to it.<sup>98</sup> The United States, a historical leader in promoting human rights and juvenile justice reform, has not attempted to change its law in light of this universally accepted practice and has fallen behind the practice of the rest of the world.

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<sup>97</sup> See Human Rights Advocates, Submission to the Sixty-First Session of the Commission on Human Rights, *The Death Penalty and Life Imprisonment Without the Possibility of Release for Youth Offenders Who Were Under the Age of 18 at the Time of the Offense*, Spring 2005, <http://www.humanrightsadvocates.org/images/Juvenile%20Sentences.doc> (last visited Dec. 22, 2006). At least one federal judge has stated that the CRC “has attained the status of customary international law.” *Sadeghi v. INS*, 40 F.3d 1139, 1147 (10th Cir. 1994) (Kane, J., dissenting).

<sup>98</sup> There is a wealth of state practice when it comes to refusing to sentence juvenile offenders to LWOP. Only the United States and Somalia have not ratified the CRC. Further, because the United States signed the CRC in 1994, it cannot be considered a persistent objector to the treaty. See Lynn Loschin, *The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework*, 2 U.C. DAVIS J. INT’L L. & POL’Y 147, 163 (1996) (a persistent objector is a state that has consistently and expressly protested the rule during the rule’s inception and development and, consequently, can claim the right not to be bound by the rule.).

### III. JUVENILE LWOP VIOLATES THE EIGHTH AMENDMENT TO THE CONSTITUTION

The U.S. Constitution prohibits “cruel and unusual punishment.”<sup>99</sup> This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment.<sup>100</sup> Under the Supreme Court’s reasoning in *Roper*, a LWOP sentence constitutes “cruel and unusual punishment.”<sup>101</sup>

In *Roper*, the Court held that death sentences for juveniles violate the Eighth and Fourteenth Amendments.<sup>102</sup> The Court reasoned that the “evolving standards of decency that mark the progress of a maturing society” demonstrate that it is disproportionate to execute a defendant for a murder committed while the defendant is under the age of 18.<sup>103</sup> Even though many state laws permitted the imposition of death sentences on juveniles, the Court indicated that it exercised independent judgment to determine whether such a penalty is disproportionate.<sup>104</sup> The Court exercised independent judgment by considering medical, psychological, and common experience which all show that children under 18 years are less culpable and amenable to rehabilitation than adults.<sup>105</sup> The Court concluded that a sentence cannot be imposed on juveniles, if it implies that an offender cannot be rehabilitated.

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<sup>99</sup> The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

<sup>100</sup> *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J., concurring). *See also* *Newman v. Alabama*, 559 F.2d 283, 287 (5th Cir. 1977) (stating “[i]t was not until 1962 that the Supreme Court applied the Eighth Amendment to the states through the Fourteenth Amendment” *Id.*).

<sup>101</sup> *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>102</sup> *Roper* at 578.

<sup>103</sup> *Id.* at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 101, (1958) (plurality opinion)).

<sup>104</sup> *Id.* at 564.

<sup>105</sup> *Id.* at 568-76 (Court examined recent studies about brain development and psychology).

The Court's reasoning in *Roper* applies with equal force to juvenile LWOP because this sentence, like a death sentence, implies that the juvenile cannot be rehabilitated.<sup>106</sup> In its analysis, the Court considered precedents where juveniles were treated differently than adults and took notice of the views of the international community.<sup>107</sup> There, the Court commented on the severity of juvenile LWOP as follows: "it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, *in particular for a young person*."<sup>108</sup> The thrust of the Court's reasoning is that juveniles are categorically different from adults in the criminal law context; therefore, courts must consider this categorical difference during sentencing. Courts should look at trends, contexts, and practices—nationally and internationally. The consensus is against LWOP nationally, as well as internationally. For instance, the majority of juveniles serving LWOP sentences are from four states: Florida (273), Louisiana (317), Michigan (306), and Pennsylvania (332).<sup>109</sup>

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<sup>106</sup> In oral argument in *Roper*, Justice Scalia, who eventually dissented from the Court's opinion, concluded that the arguments that apply to juvenile death penalty apply equally to juvenile LWOP. See Transcript of Oral Argument at page 6, lines 12-24, *Roper v. Simmons*, [www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/03-633.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-633.pdf), (last visited Dec. 24, 2006); See *Roper*, 543 U.S. at 578-79 (it is important to note that *Roper* does not stand for the proposition that juvenile LWOP is unconstitutional. In fact, the death penalty sentence that was struck down in that case was replaced with LWOP.).

<sup>107</sup> *Roper*, 543 U.S. at 575-78 (The Court referenced several international covenants in concluding that the Eighth Amendment forbid juvenile death penalty. Additionally, the Court has often given weight to the youthfulness of the offender in the criminal cases). See also *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (holding that courts must "take into account those special concerns that are present when young persons...are involved" in waiving Miranda rights.); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (in examining voluntariness of consent to search, courts must consider, *inter alia*, the youth of the accused).

<sup>108</sup> *Roper*, 543 U.S. at 572 (emphasis added).

<sup>109</sup> HRW Report, *supra* note 4, at 35 and Appendix D: State Population Data Table at 123.

In most states where juvenile LWOP is available, it is rarely imposed.<sup>110</sup>

In *Roper*, the Court drew a bright line for juvenile culpability at age eighteen. The Court, after mentioning that certain characteristics such as lack of maturity, lower level of mental and emotional development, and inability to make sound judgments made juveniles less culpable for their crimes, “conclude[d] [that] the same reasoning applies to *all* juvenile offenders under 18.”<sup>111</sup> Accordingly, sentencing juveniles, who are less culpable for their crimes, to LWOP like adults who commit similar offenses concludes that juveniles will never be rehabilitated, and such conclusion exceeds the bounds of decency. The bounds the Court created in *Roper* are that juveniles are more amenable to rehabilitation and it is impossible to determine that juveniles are beyond redemption.<sup>112</sup> Therefore, sentences (such as death and LWOP sentences) excluding the possibility of rehabilitation of juveniles violate the Eighth Amendment.

#### IV. JUVENILE LWOP ARE EXCESSIVE AND INEFFECTIVE DETERRENT FOR JUVENILES

Juvenile LWOP sentences have been largely ineffective in achieving the common goals of the justice system: rehabilitation, deterrence, retribution, and incapacitation.<sup>113</sup> Proponents of juvenile LWOP sentences argue it is a great

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<sup>110</sup> *Id.* (Montana (1), Rhode Island (2), Minnesota (2), New Hampshire (3)).

<sup>111</sup> *Roper*, 543 U.S. at 571.

<sup>112</sup> *Id.* at 568-75 (“it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievable depraved character.” *Id.* at 570.).

<sup>113</sup> *See, e.g.,* *Kansas v. Hendricks*, 521 U.S. 346, 373 (1997) (Kennedy, J., concurring); *See* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1899 (1991) (The purpose of incapacitation is to protect society from dangerous persons by physical confinement or otherwise disabling them.); *See also* *Ford v. Wainwright*, 477 U.S. 399, 408 (1986) (stating that retribution is “the need to offset a criminal act by a punishment of equivalent ‘moral quality’”); *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring).

deterrent to juveniles. This argument is similar to the one made in *Roper*, where the Court rejected the idea that the death penalty had a deterrent effect on juvenile criminality.<sup>114</sup> There, the Court noted that juveniles lack the mental ability to weigh the possible consequences of their actions, therefore, the death penalty is not an effective deterrent.<sup>115</sup> That argument applies to juvenile LWOP as well. “The theory of deterrence...is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out [unlawful] conduct.”<sup>116</sup> The Court in *Atkins* reasoned that the “diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses” makes defendants less morally culpable.<sup>117</sup> For these reasons, the Court held the use of death penalty for mentally retarded defendants is unconstitutional.<sup>118</sup>

Juveniles are somewhat analogous to mentally retarded defendants (using the same factors set out in *Atkins*) to the extent that juveniles have lesser ability to understand and process information, to learn from experience (by their definition, their experiences are limited), and children are often unable to engage in logical reasoning, which is why they are excluded from participating in many civil and political activities granted to adults. Most people agree—or at least do not violently disagree—that children cannot fully appreciate or understand spending the rest of their lives behind bars for their criminality because they do not have the same maturity, judgment, or emotional development as adults.

Children do not have the ability to control impulses as well as adults. The Court, in *Roper*, found that juveniles are more susceptible to immature behavior, irresponsible behavior, negative influences, peer pressure, and lack control

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<sup>114</sup> See *Roper*, 543 U.S. at 571.

<sup>115</sup> *Id.* (the Court noted the availability of LWOP sentences. *Id.* at 572.).

<sup>116</sup> *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

over their immediate surroundings.<sup>119</sup> Due to the diminished culpability of juveniles, the harsh LWOP sentence will not deter them from committing crimes because, categorically, they cannot comprehend the severity of the sentence. Further, the scarcity of life without parole for juveniles around the world—12 in total<sup>120</sup>—speaks volumes to the global recognition of the ineffectiveness of the sentence. The lack of maturity to fully weigh risks and understand the future consequences of their actions shows that LWOP sentences do not deter juvenile criminality.<sup>121</sup> To argue otherwise would be the ultimate exercise in deceit.

### **A. Juvenile LWOP Sentences Violate the Principle of Rehabilitation**

When it comes to juvenile offenders, the law must promote rehabilitation. Juvenile LWOP frustrates this goal. Life imprisonment denies hope to juveniles who have the ability to improve their behavior and character.<sup>122</sup> Sentencing juveniles to prison for the rest of their lives does not serve the stated goal of rehabilitation. An example is where a trial judge refused to sentence an 11-year-old, convicted of murder, to life without parole. The judge stated “Don’t ask the Judge to look into a crystal ball today and predict five years down the road. Give the Juvenile system a chance to rehabilitate. Don’t predict today, at sentencing, whether the child will or will not be rehabilitated, but keep the options open.”<sup>123</sup>

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<sup>119</sup> *Roper*, 543 U.S. at 553. *See also* *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988).

<sup>120</sup> *Davidson*, *supra* note 74.

<sup>121</sup> *See* *Naovarath v. State*, 779 P.2d 944, 948 (Nev. 1989) (holding LWOP sentence unconstitutional and questioned whether the sentence could serve as deterrent for teenagers).

<sup>122</sup> *Id.*

<sup>123</sup> Marc Mauer, Ryan S. King, and Malcolm C. Young, *The Meaning of “Life”: Long Prison Sentences in Context*, (The Sentencing Project, 2004), 18, [www.sentencingproject.org/pdfs/lifers.pdf](http://www.sentencingproject.org/pdfs/lifers.pdf) (last visited Dec. 22, 2006) (quoting Michigan state court judge Eugene Arthur Moore). *See also* Stephen J. Morse, *Blame and Danger: An Essay on Preventive*

In many cases, juvenile crimes are related to temporary and changing characteristics of immaturity and impulsivity. These characteristics should be taken into account when courts deal with children, if the best interest of the child is the primary consideration. Rehabilitation focuses on the best interest of the child. Rehabilitation, however, is abandoned when a child is sentenced to LWOP because there is no chance of integration. When juveniles are sentenced to LWOP, they are “denied educational, vocational, and other opportunities to develop their minds and skills because prisons reserve these under-funded programs for individuals that will someday be released.”<sup>124</sup> Providing juvenile offenders some chance of integration into society will give them something to work toward—rehabilitation.

Juvenile offenders struggle with the anger and emotional turmoil of knowing they will die in prison, perhaps seventy years later. Juveniles do not have the capability to cope physically, mentally, and emotionally because they went to prison at a very young age.<sup>125</sup> Consequently, many juveniles sentenced to LWOP commit or attempt to commit suicide.<sup>126</sup> They lack the incentive to try to improve their character or skills because they will never be released.

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*Detention*, 76 B.U. L. REV. 113, 126 (1996) (noting that predictions according to health professionals is that future violence among serious offenders could increase.).

<sup>124</sup> See HRW Report, *supra* note 4, at 5.

<sup>125</sup> See generally HRW Report, *supra* note 4, at 54, 57 (citing Institute of Crime, Justice and Corrections and the National Council on Crime and Delinquency-U.S. Department, Office of Justice Programs, Bureau of Justice Assistance, *Juveniles in Adult Prisons and Jails: A National Assessment*, (Oct. 2000)), [www.ncjrs.org/pdffiles1/bja/182503-1.pdf](http://www.ncjrs.org/pdffiles1/bja/182503-1.pdf) (last visited Dec. 5, 2006) (Adult inmates have had some experience in the ‘outside’ world and are generally more equipped to deal with the difficulties attendant to prison life than juveniles do. Juveniles came into the system young, not fully developed mentally, physically, and emotionally and are susceptible to severe abuses in prison.).

<sup>126</sup> HRW Report, *supra* note 4, at 54.



### **B. Juvenile LWOP Sentences Impose Excessive Retribution on Juveniles**

Juvenile LWOP sentences are improperly retributive. In *Roper*, the Court stated “[r]etribution is not proportional if the law’s most severe penalty [the death penalty] is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”<sup>127</sup> This statement applies with equal force to juvenile LWOP sentences. More significantly, in states that have abolished the death penalty, LWOP is the harshest possible sentence for any adult. Therefore, sentencing juveniles to the most severe penalty allowed by law is cruel and unreasonable.

While it is a well established principle that the combination of age, immaturity, and inability to understand consequences of their actions makes juveniles less culpable, juvenile LWOP sentences are completely inconsistent with this principle and thus impose excessive punishment on juveniles. The same maximum sentence used to punish adults for the same crime—usually first-degree murder—is the same punishment imposed on juveniles convicted of the same crime. In *Weems v. United States*, the Court held that the Eighth Amendment prohibits “all punishments which, by their excessive length or severity, are greatly disproportionate to the offenses charged.”<sup>128</sup> Indeed, this punishment is much worse for juveniles. Consider this: a 14-year-old and a 40-year-old are convicted of the same crime and sentenced to LWOP. The punishment is significantly different because the juvenile is likely to be incarcerated for a much longer period and misses the most formative parts of life. Ultimately, the juvenile is not able to prove that, with age and appropriate rehabilitative programs, he may be suitable for reintegration.

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<sup>127</sup> *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

<sup>128</sup> *Weems v. United States*, 217 U.S. 349, 371 (1910).

### C. Juvenile LWOP Sentences Violate Constitutional Provisions Prohibiting Uncivilized Punishment

In *Trop*, the Court held the constitutionality of a punishment is determined by “whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.”<sup>129</sup> Applying this principle, it is clear that sentencing juveniles to life without parole is not only rare (currently 12 in the rest of the world) but “its imposition is...wanton and freakish.”<sup>130</sup> The global disdain for sentences that permanently banish juveniles from society leads to the conclusion that such a punishment violates the global definition of “civilized treatment.” Additionally, juvenile LWOP sentences unreasonably and disproportionately incapacitate juvenile offenders where they no longer pose a threat to the community.<sup>131</sup> Proportionality limitations arise, not to restrict society’s interest in punishment, but to acknowledge that punishment is not the only purpose that states must pursue, especially for juveniles. The Supreme Court has held that some sentences violate the Eighth Amendment’s prohibition of “cruel and unusual punishment” because the penalties were disproportionate to the offenses.<sup>132</sup> In *Weems*, the Court struck down a criminal sentence because it was

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<sup>129</sup> *Trop v. Dulles*, 356 U.S. 86, 99 (1958).

<sup>130</sup> Kenneth Gewerth and Clifford K. Dorne, *Imposing the Death Penalty on Juvenile Murderers: A Constitutional Assessment*, 75 JUDICATURE 6, 7-8 (1991). See also The Providence Journal, *Young murder defendant pleads guilty*, July 26, 2005, at A1 (comments of Rhode Island Superior Court Judge William A. Dimitri when sentencing Marvin Rubio, who was 15-years-old at the time of the offense: “Everyone involved in this case were children...I feel like a Third World judge imposing these [life] sentences on kids this age. But the law is the law” *Id.*).

<sup>131</sup> See *United States v. Jackson*, 835 F.2d 1195, 1200 (7th Cir. 1987) (Posner, J., concurring) (“A civilized society locks up [criminals] until age makes them harmless but it does not keep them in prison until they die.” *Id.*).

<sup>132</sup> *Weems v. United States*, 217 U.S. 349, 377 (1910) (recognizing the proportionality requirement of the Eighth Amendment).

“cruel in excess of imprisonment.”<sup>133</sup> Similarly, in *Solem v. Helm*, the Court held that a lengthy prison term violated the Eighth Amendment.<sup>134</sup> In *Solem*, an adult defendant was sentenced to LWOP under a South Dakota recidivist statute.<sup>135</sup> The Court reasoned that “[i]t would be anomalous indeed” if fines and the death penalty were subject to proportionally analysis under the Eighth Amendment and “punishment of imprisonment” was not.<sup>136</sup> Incapacitation is a means of preventing future crime. Certainly, LWOP would achieve this purpose (as would the juvenile death penalty), but, according to *Roper*, not even psychiatrists or psychologists can predict whether a juvenile is beyond rehabilitation.<sup>137</sup> Therefore, the Eighth Amendment forbids juvenile LWOP sentence because such extreme sentences are “grossly disproportionate” to the crimes.<sup>138</sup> Adults convicted of murders and rape are rarely sentenced so harshly—in *United States v. Fountain*, two defendants convicted of first-degree murder, each having previously murdered three people, were sentenced to life with possibility of parole after ten years.<sup>139</sup> Accordingly, juveniles should be given a chance at rehabilitation and have a possibility of parole when

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<sup>133</sup> *Id.* at 377. (“it is a precept of justice that punishment for the crime should be graduated and proportioned to offense.” *Id.* at 367.). See also *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991) (Scalia, J. concurring)) (Although Justice Scalia has argued that the Eighth Amendment contains no “guarantee against disproportionate sentences” because proportionality “is inherently a concept tied to the penological goal of retribution.” He further argued that “the plurality is not applying law but evaluating policy” which is improper for the Court. *Id.* at 32.).

<sup>134</sup> *Solem v. Helm*, 463 U.S. 277 (1983).

<sup>135</sup> *Id.* at 279.

<sup>136</sup> *Id.* at 289 (The Court concedes that reversal of prison sentences on proportionality grounds will be “exceedingly rare.” *Id.* at 289-90. (citing *Rummel v. Estelle*, 445 U.S. 263, 272 (1980))).

<sup>137</sup> *Roper v. Simmons*, 543 U.S. 551, 573 (2005).

<sup>138</sup> See *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (citation omitted).

<sup>139</sup> *United States v. Jackson*, 835 F.2d 1195, 1198-99 (7th Cir. 1987)(Posner, J., concurring) (citing *United States v. Fountain*, 768 F.2d 790, 799-800 (7th Cir. 1985) (emphasis added).

rehabilitated and reasonably punished. Juvenile LWOP permanently banishes juveniles from society even when rehabilitated.

## V. RECOMMENDATIONS

Lawmakers and judges must authorize a term of years or sentences with eligibility of parole for juvenile offenders to eliminate this injustice. This approach has been adopted in New York, Oregon, Kentucky, and more recently in Colorado.<sup>140</sup> For instance, under Colorado law, a juvenile who would otherwise receive LWOP would be eligible for parole after 40 years.<sup>141</sup> State and federal judges have authority and are compelled under the U.S. Constitution<sup>142</sup> to refuse to sentence juveniles to LWOP sentences because it is patently unfair. Furthermore, juveniles sentenced to life in prison without parole violates international treaty and customary law. In *People v. Miller*, the Illinois Supreme Court affirmed a trial court judge's refusal to impose the mandatory LWOP sentence on a 15-year-old convicted of two counts of first-degree murder, ruling that the punishment was disproportionate to the crime and violates the Constitution and international law.<sup>143</sup>

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<sup>140</sup> See N.Y. PENAL LAW § 70.05(2)(c) (McKinney 1993) (Under New York law, the court must impose a statutorily mandated minimum period of imprisonment when sentencing a juvenile); See *State v. Davilla*, 972 P.2d 902, 904 (Or. 1998) (holding that "from the plain language of the statutes...juveniles [may] not be sentenced to imprisonment for the duration of their lives without having the possibility of release. A departure sentence of 116 years is in practical effect imprisonment for life without the possibility of release or parole." *Id.*); *Workmen v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968) (holding that life imprisonment without benefit of parole when applied to juveniles "shocks the general conscience of society today and is intolerable to fundamental fairness." *Id.*); COLO. REV. STAT. §18-1.3-401 (as amended in May 2006).

<sup>141</sup> See COLO. REV. STAT. §18-1.3-401 (IV)(4)(a) (2006).

<sup>142</sup> U.S. CONST, art. VI, cl. 2. (state judges are compelled because the U.S. Constitution is the supreme law of the land).

<sup>143</sup> *State v. Miller*, 781 N.E.2d 300, 330 (Ill. 2002) (affirming the trial judge's sentence of 50 years in prison for a juvenile rather than the LWOP mandated by Illinois statute.).

State and federal judges should adopt the same line of reasoning. In fact, the Supreme Court has interpreted Article VI of the Constitution to require that “*state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement.*”<sup>144</sup> Accordingly, state judges should exercise their discretion to not impose LWOP sentences on juveniles.<sup>145</sup>

Similar to the Supreme Court’s decision in *Roper*, the government must provide retroactive relief to juveniles currently sentenced to LWOP. These individuals (who may no longer be juveniles) should be re-sentenced to a term of years taking into account the individual’s potential for rehabilitation, risk of recidivism, danger to the public, age, and maturity at the time of offense. These individuals should be provided treatment, education, and rehabilitation programs. Further, those sentenced as a juvenile, who have served 20 years or more should be immediately eligible for parole.

State courts should not shy away from looking at international standards in evaluating state laws when fashioning sentences. International law has guided several court decisions. The Oregon Supreme Court used international law and practice in holding unconstitutional intimate searches performed on inmates by guards of the opposite sex.<sup>146</sup> Similarly, the California Supreme Court looked to international standards in determining the constitutionality of state civil and criminal commitment procedures.<sup>147</sup>

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<sup>144</sup> U.S. v. Pink, 315 U.S. 203, 230-31 (1942) (emphasis added); See also *Zschernig v. Miller*, 389 U.S. 429 (1968) (holding that where state probate law conflicts with a treaty, the state law must bow to the superior federal policy of the treaty).

<sup>145</sup> Further, judges may find that juvenile LWOP violates the Eighth Amendment to the U.S. Constitution because the punishment, as applied to a juvenile, would be cruel and unusual in light of the global concurrence on the matter.

<sup>146</sup> See *Sterling v. Cupp*, 625 P.2d 123, 131 (Or. 1981).

<sup>147</sup> See *Estate of Hofferber v. Hofferber*, 616 P.2d 836 (Cal. 1980). See also *Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980) (court also used

Governors also have a role in correcting this injustice. Governors should urge state lawmakers to abolish LWOP sentences for juvenile offenders. For instance, New York law provides that a child under the age of 15 who commits murder cannot be sentenced to death or life imprisonment without parole.<sup>148</sup> Further, governors should commute the LWOP sentences to a term of years (in light of the criteria described above) or grant clemency to those who have served 15 or more years in prison who no longer pose a threat to the public and have been rehabilitated.<sup>149</sup> For those juveniles currently serving LWOP sentences, if the parole board is unconvinced of their rehabilitation or takes the position that the individual still poses a threat to society, they may not be released. The position of this note is not to release juveniles convicted of heinous crimes; rather, that there must be a *possibility* of release.

More important, legislators and executive officials should provide courts with greater resources to deal effectively with juvenile offenders. This will revitalize the courts in the context of contemporary society and give them the capacity to achieve the purpose for which they were originally created. This “get-tough” approach on juvenile criminality is undeserving as the perception of extremely violent youths is based largely on the acts of a small number of juveniles with ready access to guns.<sup>150</sup> The judge must keep the best interest of the child and remember that each child is important as an

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international standards to construe the scope of constitutional protection of privacy in the home).

<sup>148</sup> N.Y. PENAL LAW § 125.27 (1)(b) (1998 & Supp. 2004) (removing juveniles from jurisdiction for first degree murder by stating that liability for murder in the first degree requires that the defendant be “more than eighteen years old” at the time of the commission of the crime.).

<sup>149</sup> Inmates whom have served fifteen years or more should be immediately eligible for parole. The parole board, as always, will determine whether the inmate has been rehabilitated, no longer poses a threat to self or the general public, etc.

<sup>150</sup> See Thomas F. Geraghty, *Symposium on the Future of the Juvenile Court: Justice for Children: How Do we Get There?*, 88 J. CRIM. L. & CRIMINOLOGY 190, 190 n.2 (citing Donna Lyons, *Juvenile Crime and Justice: State Enactments*, 1995, 20 ST. LEGIS. REP. 17 (1995) (50-state survey), 191, 199 (discussing the Illinois statutory change) (1997)).

individual, to help guide the sentencing policy. A change in the sentencing scheme as proposed here will impose substantial punishment, provide incentives for rehabilitation, and, where rehabilitation works, eliminate the economic and social costs of permanent incarceration.

## VI. CONCLUSION

In the aftermath of *Roper v. Simmons*, a sentence of life imprisonment without parole for juveniles violates the United States Constitution. Even if the LWOP could be applied to a juvenile without violating the Eighth Amendment, it violates international law. Although the Supreme Court has not addressed the constitutionality of juvenile LWOP directly, when it does, it will consider the “climate of international opinion concerning the acceptability of [such] punishment” and it will find that juvenile LWOP sentences violate international law.<sup>151</sup> Challenges to juvenile LWOP sentences have not been considered from the point of view of juvenile culpability and competency.<sup>152</sup> However, state and federal judges have the power to correct this grave injustice before the Justices of the U.S. Supreme Court rule on the question.

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<sup>151</sup> *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (quoting *Trop v. Dulles*, 356 U.S. 86, 102 (1958)). See also *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Knight v. Florida*, 528 U.S. 990, 997-98 (1999) (Justice Breyer noting the Court’s “[w]illingness to consider foreign judicial news in comparable cases is not surprising to a Nation that from its birth has given a ‘decent respect to the opinions of mankind.’” *Id.*) (Breyer, J., dissenting, from denial of certiorari).

<sup>152</sup> *Foster v. Withrow*, 159 F. Supp.2d 629, 636 (E.D. Mich. 2001) (Petitioner, convicted of a murder committed at age sixteen was sentenced to LWOP, challenges sentence without raising claims of juvenile culpability and competency. Court held sentence does not violate due process or Eighth Amendment); *Rice v. Cooper*, 148 F.3d 747, 749 (7th Cir. 1998) (Petitioner, an illiterate and mildly retarded 16-year-old, sentenced to LWOP challenges sentence by raising issues of ineffective assistance of counsel, competence to stand trial and competence to waive Miranda warnings, without raising claims of juvenile culpability); *Harris v. Wright*, 93 F.3d 581, 582-83 (9th Cir. 1996) (affirming sentence of 15-year-old sentenced to LWOP, who based appeal on violation of Eighth Amendment and due process.).

Judges need not wait for the legislature to act because judges are bound by international law and are authorized to enforce international law and human rights treaty.<sup>153</sup> The *Miller*, *Atkins*, and *Roper* decisions all support a finding that juvenile LWOP sentences violate the Constitution. Justice Harry Blackmun once urged that “it... is appropriate to remind ourselves that the United States is part of the global community... and that courts should construe our statutes, our treaties, and our Constitution, where possible, consistently with ‘the customs and usages of civilized nations.’”<sup>154</sup> Accordingly, it would be a violation of international and constitutional law to continue sentencing juveniles to die in prison when judges can correct the mistake.

Treating children like adults when it comes to sentencing inaccurately assumes that juveniles, whom cannot be trusted with voting or smoking because they “lack the judgment to make an intelligent decision,” possess the skills to understand the consequences of a lengthy prison sentence before he or she acts.<sup>155</sup> Such reasoning and sentencing is unsound, unconscionable, and does not correspond to the notions of justice, especially where it violates clear international standards that explicitly forbid such sentences.<sup>156</sup> Domestic standards also become meaningless when courts act as a vehicle of vengeance. The main goal of the adult criminal justice system is to punish criminal offenders, whereas the juvenile justice system—focuses on rehabilitation—at least,

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<sup>153</sup> See *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924). See also Honju Koh, *supra* note 84, at 1824 (noting that customary international law is federal common law and preempts inconsistent state practices).

<sup>154</sup> Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

<sup>155</sup> See *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 587 (2001) (concluding that children lack the judgment to make an intelligent decision about whether to smoke.). See also *Parham v. J.R.*, 442 U.S. 584 602-03 (1979) (explaining that “parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. . . . Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment.” *Id.*).

<sup>156</sup> Article 40(1), *supra* note 63.



in theory. When LWOP sentences are handed down to juveniles, the courts have failed to recognize the possibility of rehabilitation.

Recognizing the lesser culpability and competency of children does not require society to be soft on crime. Rather, it requires society to eliminate one of the harshest punishments that can be imposed on adults and instead to focus on the causes of crime while taking a sensible and civilized approach to sentencing. Society has recognized the distinction between juveniles and adults in almost every aspect of society—the same logic should be extended to penal sanctions. Providing juvenile offenders some chance of integration into society will give them hope for actual rehabilitation to atone for their crimes.

Life without parole sentences send a clear message to the world—that juvenile offenders in the United States are *permanently* banished from society. Such a sentence discourages juveniles from attempting to reform themselves during incarceration. These sentences promote the antithesis of rehabilitation.

Under the current legal landscape, the imposition of life without parole sentences for juveniles is unconstitutional. They are not only repugnant to the notions of rehabilitation, but have no deterrent effect, are disproportionate, and are beyond the time necessary to incapacitate the offender. Sentencing minors to die in prison is cruel and has become unusual, in light of the Court's decision in *Roper* and the overwhelming global condemnation of such sentence. It is also worth repeating that only twelve juveniles in 192 countries are currently serving such a sentence in comparison to the more than 2,200 juveniles serving LWOP sentences in the United States.<sup>157</sup> Further, in states that prohibit the death penalty, LWOP is the harshest possible sentence for any adult or juvenile. To sentence a juvenile like an adult is to adopt the view that the offender's culpability is completely irrelevant.

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<sup>157</sup> See HRW Report, *supra* note 4, at 123-24.

Punishing a youth offender with the longest prison sentence possible, denying hope of reintegration into society, and offering no motivation for rehabilitation is repugnant to the notions of justice, rehabilitation, and goals of the juvenile justice system. In *Roper*, the Court concluded that juveniles are more amenable to rehabilitation than adults and as a result should be treated differently at sentencing.<sup>158</sup> It follows that denying the possibility of parole and dictating that a child die in prison is particularly cruel and unusual. “A civilized society locks up [criminals] until age makes them harmless but *it does not keep them in prison until they die.*”<sup>159</sup>

It is time for the United States to develop a justice system that is consistent with modern and global standards of justice. Today, the treatment of juveniles in the criminal justice system is, at best, a noble failure and at worst, a great catastrophe. It is obvious that a change is urgent. Now is the time for the United States to leave the lonely island of juvenile injustice amidst a vast ocean of global concurrence. This shameful sentencing practice diminishes us as a society and *it*, not the children, must be sentenced to death.

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<sup>158</sup> *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (stating, “From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that minor’s character deficiencies will be reformed.” *Id.*).

<sup>159</sup> *United States v. Jackson*, 835 F.2d 1195, 1200 (7th Cir. 1987) (Posner, J., concurring) (emphasis added).